STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-122

June 16, 2003

MAINE PUBLIC UTILITIES COMMISSION
Investigation into Potential Violations of State Laws and Commission Rules by WebNet Communications, Inc.

ORDER FINDING VIOLATIONS AND IMPOSING ADMINISTRATIVE PENALTY

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

In this Order, we find that WebNet Communications, Inc. (WebNet) engaged in multiple violations of Maine law and Commission rules by causing 55 customers to be switched to WebNet as their primary interexchange carrier without properly obtaining the authority of those customers to do so, a practice known as "slamming." In 28 of those cases, WebNet used deceptive means to obtain ostensible consent, and it provided "third party verification" tapes that we conclude were most likely altered. We require WebNet to pay an administrative penalty of $4,555,000, and we terminate its authority to provide telephone service in Maine.

II. BACKGROUND

A Maine statute and a Commission rule both prohibit the practice of "slamming,' i.e., the changing of a customer's preferred telephone carrier without the authorization or informed consent of the customer. The relevant portion of 35-A M.R.S.A. § 7106 states:

> **§7106. Consumer protection**
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> **1. Unauthorized change of carrier.** This subsection governs the initiation of a change in a customer's local or intrastate interexchange carrier that is not authorized by that consumer.
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> A. Notwithstanding Title 32, chapter 69, subchapter V or Title 32, section 4690-A, subsection 4, and except as otherwise provided by the commission by rule adopted pursuant to subsection 3, a local or intrastate interexchange carrier may not initiate the change of a customer's local or intrastate carrier unless the change is verified by one of the following methods:
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> (1) Written authorization from the customer;

(2) Toll-free electronic authorization placed from the telephone number that is the subject of the change order; or

(3) Oral authorization obtained by an independent 3rd party.

35-A M.R.S.A. § 7106(3) requires the Commission to adopt implementing rules. The Commission adopted Chapter 296 (Selection of Primary Interexchange and local Exchange Carriers). Chapter 296, § 3 governs changes in preferred carriers. It provides detailed requirements for satisfying the verification alternatives listed in 35-A M.R.S.A. § 7106(1)(A).[1]

Beginning in June of 2001, numerous customers filed complaints with the Commission's Consumer Assistance Division (CAD) claiming that their preferred carriers[2] for intrastate (and in many cases, interstate) interexchange (long-distance) service had been changed to WebNet without their consent. The unauthorized changes took place during the period March 2001 to December 2001.

Based on the large number of complaints and their apparent merit, on March 12, 2002, we opened an investigation of WebNet's activities, including the slamming allegations (which included failures to obtain proper verification), as well as allegations that WebNet increased rates without providing notice to customers as required by law and charged rates that were not included in its rate schedule. We issued an Order Regarding Procedures, Discovery and Intervention on April 26, 2002. In that order, we established a Prosecutorial Staff for this case and ordered it to file a report "containing its findings, conclusions and recommendations for Commission action." On July 1, 2002, the Prosecutorial Staff filed an extensive Report describing the various claimed violations of the slamming statute and rule as well as other claimed violations of Maine law, and its recommendations.

The Hearing Examiner ordered WebNet to respond to the Report. WebNet responded by, in effect, filing what amounted to a motion to dismiss. On September 4, 2002, we issued an Order Continuing Proceeding that rejected WebNet's arguments. Further notice to WebNet concerning the nature of this proceeding and the procedures

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[1] Section 3 of Chapter 296 is too lengthy to quote in full here. The full text of Chapter 296 is at ftp://ftp.state.me.us/pub/sos/cec/rcn/apa/65/407/407c296.doc.

[2] A "preferred carrier" is the "carrier to which a customer has presubscribed for local, intrastate, interstate, or international telephone service." PUC Rules, Ch. 296, § 1(B)(7). A presubscribed carrier is the one that will carry the calls when the caller dials only the number of the intended recipient of the call.

that we would follow was contained in the Order Determining Jurisdiction and Clarifying Procedure, issued on January 9, 2003.[3]

On March 3, 2003, counsel for WebNet sent an e-mail to the Examiner stating that based on "affirmative instruction from [the] client," counsel had "no authority to participate in any other procedural matters concerning this proceeding." A Motion for Settlement and Final Disposition, filed on March 10, 2003 by counsel for WebNet, stated "Respondent respectfully notifies the Commission that it will no longer participate in this proceeding [other than by filing the Motion] because it lacks the resources and because its outcome is a foregone conclusion." Finally, WebNet's counsel sent another e-mail to the Examiner on March 13, 2003, stating that "WebNet will no longer be participating in this proceeding."[4]

A hearing was held on April 17, 2003. The Prosecutorial Staff presented witnesses Derek Davidson, Director of the Consumer Assistance Division, and Mary James, Assistant Director of the Consumer Assistance Division, and offered exhibits, all of which were admitted into evidence. The Public Advocate participated in the hearing. WebNet did not appear.

III. THE RECORD

The record consists of the notices and orders issued by the Commission and Hearing Examiner, the motions and other filings by the parties (exclusive of discovery requests and responses that were not entered into the record at the hearing), the rulings of the Hearing Examiner contained in the transcript of the motion hearing held on January 7, 2003, the transcript of the scheduling and prehearing conference on March 3, 2003, the transcript of the hearing held on April 24, 2003, and exhibits entered at the hearing. The exhibits include the Prosecutorial Staff report (exclusive of the "Customer Statements" that had been prepared by the Prosecutorial Staff (Appendix II of the Prosecutorial Staff Report)), the CAD's files for each of the complaints included in the prosecution,[5] deposition transcripts of witnesses,[6] and other exhibits.

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[3] The record also contains numerous procedural motions and motions related to discovery (from both WebNet and the Prosecutorial Staff), a "Motion to Determine Jurisdiction", filed by WebNet, and other substantive motions by WebNet to terminate the proceeding.

[4] Notwithstanding these statements, counsel (or former counsel) for WebNet filed a letter "as a professional courtesy" on April 17, 2003, informing the Commission of a recent decision of the U.S. Court of Appeals for the District of Columbia that we discuss below. The Commission was aware of the decision prior to the letter.

[5] Following briefing and oral argument on a Motion in Limine filed by WebNet, the Hearing Examiner ruled on January 7, 2003, that the Prosecutorial Staff Report and the CAD records were admissible. The Examiner relied on the provisions of 35-A M.R.S.A. § 1311(2) in making this ruling. On December 5, 2002, the Prosecutorial Staff

IV. FINDINGS

A. Authorizations Obtained with Deceptive Means

We find that WebNet failed to obtain authorization for a preferred carrier change from 28 customers using deceptive means, even though it provided tape recordings of purported third party verifications. The 28 customers are: Irvin & Margaret Bond, Margaret Bullens, Martha Carton, Elizabeth Doucette, Edward Geoghan, Sharon Goggin & Brian Mason, Christopher & Victoria Grotton, John Haskell, Donald Hutchins, Phyllis Hyde, William Jackson, Alan & Patricia Johnson, Emery Johnson, Scott Johnson, Mary Jones, Mary Kelley, Diane Kennedy, Jeremiah Kennedy, Roger Lagasse, Sheila Lane, Wayne Leighton, Patricia Lewis, Joseph & Kelly Manhardt, Neil McVicar, Edie Moore, Cecil & Marie Paradis, Mrs. Leonard Pelletier, and Charles on January 7, 2003Urquhart. We find that none of these customers knowingly agreed to change their preferred carrier to WebNet, and that the purported authorizations are invalid and fraudulent.[7] These customers are listed as category 1 in Appendix A. We find that the third party verification tapes for these 28 customers do not accurately reflect the conversations these customers actually had with WebNet's third party verifier. It is a reasonable inference that the tapes were altered so that affirmative answers from the customers followed a question (quoted below) about "choosing" WebNet as the customer's preferred carriers. We find that the tapes were in fact altered in that manner.

In all of the cases in this category, the customers claimed that they never agreed to change their preferred carrier to WebNet. They also were never asked a straightforward question whether they were agreeing to change their preferred carrier. In all of the cases, the tapes contain a "yes" answer to the question and directive:

> Are you the decision maker choosing WebNet as your long distance and local long distance provider? Please say 'yes' at the tone.

In all of the cases, the customers listened to the tape recordings. None of them recalled the question quoted above. In some cases, customers agreed that they had said "yes" during the course of a conversation with WebNet or a person conducting a purported

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filed an amendment to the Report stating it would not pursue four of the complaints described in the Report.

[6] The depositions were taken by WebNet. The Prosecutorial Staff offered the transcripts at hearing, and there was no objection.

[7] WebNet, in its Motion to Determine Jurisdiction, argued that the Commission lacked jurisdiction over any of the complaints alleging fraud because the Attorney General had exclusive "jurisdiction" over matters involving fraud. We rejected WebNet's contention in our Order Determining Jurisdiction and Clarifying Procedure (January 9, 2003).

third party verification, but believed they answered "yes" to a completely different question.

In its proceeding against WebNet, the Federal Communications Commission found that that WebNet's verification methods did not satisfy FCC requirements because of the question "Are you the decision maker choosing WebNet as your long distance and local long distance provider? Please say 'yes' at the tone." The FCC found the question violated its rules because "it presumed that the consumer had already authorized a preferred carrier change during the sales portion of the call." It also found that nothing else in WebNet's script asked whether the customer had in fact chosen WebNet as his or her preferred carrier. *In the Matter of WebNet Communications, Inc., Apparent Liability for Forfeiture*, File No. EB-01-TC-064, Order of Forfeiture, FCC 03-67, ___FCC Rcd. ___¶¶ 9-10 (March 31, 2003) (*FCC WebNet Order)*.

Like the FCC, we also conclude that the question (and WebNet's script as a whole) fails to satisfy the third party verification requirement because it never asks a question of the consumer that would produce "a clear and conspicuous confirmation of a carrier change, '*i.e.*, an unambiguous, definitive, direct response from the consumer that he or she is confirming a [change in] telephone service.'" *FCC WebNet Order* at ¶ 10 (FCC cite for internal quotation omitted). We agree with the FCC that the phrase "Are you the decision maker who has chosen WebNet…" presumes that the choice has been made already. The Prosecutorial Staff also points out that the single question combines the issues of whether there is an agreement to a change in preferred carriers and whether the person responding has the authority to authorize the change, thus rendering the single "yes" answer ambigous. In addition, the statement "Please state 'yes' at the tone" suggests the answer the responder ought to give, and, to some persons, may imply that there is no choice.

We do not, however, rely on the invalidity of this question in finding WebNet liable for the unauthorized change in preferred carriers for these 28 customers because the record establishes that none of the 28 customers ever heard this question. We find WebNet liable instead because the record establishes none of these customers ever heard *any* question concerning their agreement to change preferred carriers and never actually consented to the changes.

In many cases, the customers provided a name and address to WebNet or the third party verifier, but believed they were asked to provide their names and addresses for reasons other than changing their service, e.g., so that written information they had requested about WebNet could be sent to them.

In some cases, customers were told they had won a "prize." The prizes included cash, free calling cards, free web pages and trips to Orlando, Florida. The evidence does not indicate that any of these 28 customers were induced to change their preferred carriers because of promises of prizes. Rather, the customers all state that they did not agree to the change, i.e., they believed they would receive the prize even though they had not agreed to change preferred carriers. Some of them stated that they did not

know that the conversation was even related to a potential change in preferred carriers. In any event, WebNet never provided any of these prizes to any of these customers. While we do not rely on promises of prizes for determining liability for this first category of slamming, we do consider this practice for penalty purposes. See Part V below.

B. Service Changed Twice; No TPV Provided by WebNet for Second Change

Twelve customers initially agreed to change to WebNet as their preferred carrier, then decided to change to another carrier. Thereafter, these customers were changed *back* to WebNet without authorization. In each of these cases, WebNet was able to provide evidence of third-party verification (TPV) only for the first change of service. The customers are: Ronald Benoit, Shirley Groody, Robert Hains, Robert Harriman, Ninnette King, Leland Lutz, Marguerite Lutz, Joan McCormick, Robert McCormick, Greg Morneau, Lisa Neelon, and Anne Newbury. These customers are listed as category 2 in Appendix A.

We find, in each of these cases, that WebNet violated Chapter 296, § 3(A), which states that a "submitting carrier" may not change a customer's preferred carrier without authorization from the customer, and § 3(B), which requires verification (either by a "letter of authorization," electronic authorization, or third-party verification). WebNet's failures to provide proof of verification for second changes in preferred carriers for each of these customers are themselves violations of the Rule. From these failures, we may also infer that WebNet made the second changes for each of these customers without authority, and we so find.

C. Failure to Provide Verification or Verification Was Defective

We find that WebNet changed the preferred carrier to itself for five customers without the authorization of those customers, and did not provide proof of verification to the Commission. The five customers are: Alvah Donnel, Patsy Dunton, Colby Evans, Darrell Hurd, and Josephine Ridlon. These customers are listed as category 3 in Appendix A. We find, in each of these cases, that WebNet violated Chapter 296, § 3(A), which states that a "submitting carrier" may not change a customer's preferred carrier without authorization from the customer and § 3(B), which requires verification (either by a "letter of authorization," electronic authorization, or third-party verification). WebNet's failures to provide proof of verification for the changes in preferred carriers are themselves violations of the Rule. From these failures, we may infer that, for the second change for each customer in this category, WebNet changed the preferred carrier without authority from those customers, and we so find.

In one other case (Carroll and Ruth McGary), WebNet provided a purported proof of verification (a TPV tape), but the answer to the question "Are you the decision maker choosing WebNet as your long distance and local long distance provider?" was indiscernible. For this customer, we find that WebNet violated Chapter 296, § 3(B), which requires verification (either by a "letter of authorization," electronic authorization, or third-party verification).

D. Changes in Service Authorized By a Person Other Than the Customer

In this fourth category, we find that WebNet changed the preferred carrier to WebNet for nine customers without obtaining the authority of the customer, but instead relied on another person who answered a call from (or on behalf of) WebNet that solicited the change. The customers are: Joseph Doubek, Jeff Fox, Patricia Hayden, David Ireland, Enid Kelley, Brian Kimball, Carol Lombardo, Jeffrey Mosman, and Hernan Tizon. These customers are listed as Category 4 in Appendix A. The Rule defines a customer as:

> any person who has agreed to receive, been accepted and is receiving telecommunication service or has agreed to be billed for the same, including that person's spouse or legal guardian.

Chapter 296, § 1(B)(2).[8] The evidence establishes for these nine cases that the persons who ostensibly authorized the change in service were not "customers" as defined by the Rule. In all nine cases, WebNet initiated the change, i.e., it called the prospective customer. When the new carrier has initiated the change to a customer's preferred carrier, and the customer has orally agreed to the change, the customer must also verify his or her agreement to the change through a third-party verification (TPV) process. Chapter 296, § 3(B)(3). The new carrier or the third party verifier must maintain and store the "verification data" ("e.g., the customer's date of birth or social security number") for a period of two years. In these nine cases, WebNet provided the Commission with tape recordings of claimed third-party verifications. In each of these nine cases, the customer, after listening to the tape, stated that the person apparently authorizing the change in the preferred carrier was not the customer and did not have his or her authorization to change the preferred carrier for that customer.

Some doubt might be cast on our ability to find WebNet liable for the changes in preferred carrier for these nine customers because of a ruling by the U.S. Court of Appeals ruling that a regulation of the Federal Communications Commission (FCC) was unlawful because it was not authorized by federal statute. *AT&T Corp. v. FCC*, __F.3d__(April 8, 2003) (*AT&T v. FCC)*.

The FCC had held AT&T "strictly liable" for slamming two customers where AT&T had obtained ostensible consent from persons other than the actual customers. In both of the cases, the customer claimed that the person agreeing to the change did not have authority to do so. The vacated FCC rule requires carriers to

[8] The definition also includes other persons who may be considered business "customers", but none of the customers described in the Prosecutorial Staff Report are business customers.

obtain "authorization from the subscriber."[9] The rule also prescribes certain procedures that were designed to ensure that the person responding had authority to consent.

The Court of Appeals held that the FCC's rule exceeded its statutory authority when it adopted the rule. The governing statute states that "no telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service *except in accordance with such verification procedures as the Commission shall prescribe* (emphasis added)." 47 U.S.C. § 258(a). The Court ruled that the FCC's statutory authority was limited to "verification procedures."

The Court ruled that the statute itself did not contain a requirement of actual authorization from the customer, stating that if Congress had intended such a requirement, it would have said that no change could take place "without authorization of the subscriber" rather than "except in accordance with such verification procedures as the Commission shall prescribe." It rejected the FCC's argument that obtaining the actual authorization from the customer was an "integral part" of the verification procedures. *AT&T v. FCC* at 11.

The question is whether this case has applicability to Maine's statute and rule. 47 U.S.C. § 258(a) applies on its face to intrastate, as well as to interstate, service.[10] The FCC thus has authority to implement rules (within the limits of its substantive power) that apply to intrastate service. 47 C.F.R. § 1120 does in fact apply to intrastate, as well as interstate, service.[11] In addition, Maine's statute requires that

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[9] The FCC rule defines "subscriber" as "(1) the party identified in the account records of a common carrier as responsible for payment of the telephone bill; (2) any adult person authorized by such party to change telecommunications services or to charge services to the account; or (3) any person contractually or otherwise lawfully authorized to represent such party." 47 C.F.R. § 1100(h).

[10] This provision states:

> No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of *telephone exchange service* or *telephone toll service* except in accordance with such verification procedures as the Commission shall prescribe. Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services.

47 U.S.C. § 258(a) (emphasis added).

[11] Generally, this section refers to "carriers" and "service," without distinction. Subsection (a), however, states: "Nothing in this section shall preclude any State commission from enforcing these procedures with respect to intrastate services." Subsection (b) requires carriers to obtain separate authorizations for "each service sold," e.g., "local exchange, intraLATA/intrastate toll, interLATA/interstate toll, and international toll."

rules adopted by this commission, "including rules regarding customer verification of a change of carrier," must be "consistent with" FCC rules. 35-A M.R.S.A. § 7106(3)(A).

The Maine statute, unlike the federal statute, specifically requires authorization from the customer. Subsection 1 states: "This subsection governs the initiation of a change in a customer's local or intrastate interexchange carrier *that is not authorized by that consumer* (emphasis added)." 35-A M.R.S.A. § 7106(1). Absent other considerations (such as possible federal preemption), the Maine statute, standing alone, would allow the Commission to adopt a rule stating that only a customer may authorize a change. The limitation of power in the federal statute simply does not exist in the Maine statute. The fact that the FCC rule applies to intrastate service might give rise to an argument that it would preempt any inconsistent state rule, but the FCC has specifically ruled that states are not preempted from adopting "more stringent regulations."[12] *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers,* CC Docket No. 94-129, Third Report and Order and Second Order on Reconsideration (August 15, 2000), FCC 00-255, 15 FCC Rcd 15996, 16036, ¶ 87. Although Maine law might be read to suggest a kind of voluntary federal preemption, the phrase "consistent with" does not necessarily mean "identical to," and a rule that requires approval for a change in service from a narrower group of persons than is permitted by the FCC rule would not appear to be "inconsistent" with that rule.

The Maine rule (Ch. 296) is consistent with the verification procedures of the FCC rule (which, under the ruling of the Court of Appeals, is all that the FCC rule may address). The possible inconsistency between the Maine rule and the FCC rule, as partially vacated by the Court of Appeals, relates solely to the question of *who* may authorize a change in service (which, under the Court's ruling, is a matter that the FCC may not address). Nevertheless, the practical effect of the Court's ruling is that under the partially vacated FCC rule, *anyone* answering the phone from a soliciting carrier (or responding to a third-party verification) may authorize a change. By contrast, under the Maine rule, only the "customer" may authorize the change. The definition of "customer" in our rule is somewhat more inclusive than the person listed on carriers' records as the customer of record, but it is clearly less inclusive than "any person who answers the phone and responds to a solicitation." At least with regard to the question of who may authorize a change in service, it is not possible for the Maine rule simultaneously to be consistent with the Maine statute (which expressly requires authorization from the customer) and also be fully consistent with the partially vacated FCC rule.

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[12] Consistent with this ruling, the federal rule recognizes state requirements for changes in intrastate service that are different from its provisions that govern changes in interstate service. One of the alternative verification methods under the FCC rule is "Any state-enacted verification procedures applicable to intrastate preferred carrier change orders only." 47 C.F.R. § 64.1120(c)(4).

We decide that it is lawful to enforce our rule as written. There is no clear indication that the Maine rules must slavishly follow the FCC rule, and the Court of Appeals vacated the FCC's rule solely because the federal statute did not allow the FCC to require that consent could only come from the customer.

We recognize, however, that our rule (as did the vacated FCC rule) arguably imposes a kind of strict liability on carriers, and for that reason, in this proceeding, we will impose no administrative penalty for the nine offenses in this category.[13] We have the ability to impose a fully adequate penalty on WebNet even if we impose no penalty for these nine cases. We express no opinion about whether we would impose or refrain from imposing a penalty in other proceedings that involve ostensible consent by a person who was not a customer.

V. ADMINISTRATIVE PENALTY

We impose an administrative penalty on WebNet in the amount of $4,555,000. This amount is the total of the maximum fines for each offense in the first, second, and third categories described in Part IV above. Under 35-A M.R.S.A. § 7106(2)(A) and Chapter 296, § 7(B), the "penalty for a violation may be in an amount not to exceed $5,000 for each day the violation continues, up to a maximum of $40,000 for a first offense and a maximum of $110,000 for subsequent offenses."

The first violation is that which occurred on the first date that WebNet, without authorization, changed the preferred carrier of any of the customers named above. That date is May 22, 2001, and the customer was Mrs. Leonard Pelletier (case no. 2001-10399). Although Mrs. Pelletier's preferred carrier was switched to WebNet for 23 days, the maximum penalty available for the unauthorized change in her preferred carrier is $40,000 (the equivalent of 8 days at $5000 per day).

For other customers in the first, second and third categories, we impose the maximum penalty of $5000 for each day their preferred carrier was changed, up to a maximum of $110,000 (equivalent to 22 days) per customer. The penalties for each customer change are set forth in Appendix A.

We impose the maximum penalties for all of the customer changes in the first, second, and third categories because of the egregious nature of WebNet's conduct. The statute contains the following penalty guidelines:

[13] Testimony of Prosecutorial Staff pointed out that in eight of the nine cases in which a non-customer granted consent, the consenting person was a son or daughter of the customer, and in many cases, a minor. The testimony did not establish whether the voices were obviously young children, in which case a carrier, solicitor or third-party verifier would have reason to know that the person granting consent most likely did not have authority to do so.

> A. … . In determining whether to impose a penalty, the commission may consider whether the violation was intentional. … The amount of the penalty must be based on:
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> (1) The severity of the violation, including the intent of the violator, the nature, circumstances, extent and gravity of any prohibited acts;
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> (2) The history of previous violations; and
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> (3) The amount necessary to deter future violations.

35-A M.R.S.A. § 7106(2).

The first category, consisting of over half (28) of the customers whose preferred carrier was changed, involves deception and fraud, both against the customers themselves and the Commission. Customers' preferred carriers were changed without their approval and WebNet presented "proof" to the Commission in the form of tapes of purported third party verifications that we find were altered. Customers were asked one question to which they answered yes. WebNet then provided us with tapes of conversations in which the customer's yes answer was attached to an entirely different question. The "yes" answers were to various questions that were not related to whether the customer had agreed to a change in service. In some cases, customers were told that they were being offered something other that WebNet service (such as a trip); and their acceptance of the offer was used in the tapes as "consent" to WebNet's service. WebNet's actions and its presentation of this "proof" to the Commission made a mockery of the verification process mandated by the Legislature and constituted nothing less than a fraud against the State.

These 28 cases did not entail confusion or unintended misunderstandings but rather outright dishonesty. The methods used by WebNet establish that these slammings were clearly intentional. Furthermore, there is ample evidence that this was done by WebNet or at least with its knowledge. We impose the maximum penalty for these 28 cases, consisting of the maximum daily penalty ($5000) for each day the violation continued, up to the maximum ($110,000) for each unauthorized change in preferred carrier. The intentional nature of the violations, the deceptions employed by WebNet, and the fact that nothing less is likely to deter such conduct in the future fully justify that penalty.

We also impose the maximum penalty for the second and third categories. The second category consists of the 12 cases in which there was a second change to WebNet that the customer did not authorize, and for which WebNet did not provide a TPV. The third category consists of the six cases in which the customer did not authorize the switch, and WebNet provided no TPV. If these were the only violations, it might be possible to justify lesser penalties, as it is possible they could have resulted from something other than intentional violations of the statute. However, given the deliberate deception that occurred in the first category, the total number of violations

committed by WebNet, and the fact some of the violations (in all categories) occurred after a slamming action had been brought against WebNet by the Florida Public Service Commission,[14] we conclude that these violations were either intentional or at least were a gross disregard for the requirements of the law. For these reasons and the need to deter such conduct in the future, we impose the maximum penalties in these cases.

Finally, although we found that WebNet violated the statute and rule in the nine cases in which the person on the tape was not authorized to change the service (the fourth category), we will impose no penalty for these violations because of their relatively minor nature compared to the other violations and the amount of the aggregate penalty imposed as a result of the other violations.

We find that the maximum penalties for the first, second, and third categories are also justified by other violations of law committed by WebNet and other aspects of its conduct, both with regard to the customers it acquired illegally and the Commission. The Prosecutorial Staff Report and the testimony of Mr. Davidson and Ms. James establish that during the investigatory stages of this proceeding, WebNet did not respond to repeated requests for information; it failed to be available to customers who had complaints about slamming or other practices; it slammed Maine customers even after proceedings for slamming had been initiated in another state; it charged rates to customers different from those stated in its telephonic sales solicitations; it failed to provide any of the "prizes" or inducements it promised to customers during sales solicitations (or later claimed that the prize was conditioned, e.g., on taking service for six months); it overcharged customers and billed for more minutes than the actual duration of the call; it charged rates that were not included in its rate schedules on file with the Commission, a violation of 35-A M.R.S.A. § 309(1); and it increased rates without providing direct written notice to customers, a violation of 35-A M.R.S.A. § 7307(1)(B).

According to Mr. Davidson, WebNet also caused a significant amount of inconvenience and some monetary loss to customers. Finally, WebNet engaged in numerous dilatory tactics and unmeritorious arguments concerning procedural aspects

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[14] The Florida Public Service Commission opened an investigation on August 11, 2000 to investigate whether WebNet should be ordered to show cause why it should not be fined or have its certificate canceled for apparent violation of Rule 25-4.118 of the Florida Administrative Code (Local, Local Toll, or Toll Provider Selection). *In re: Initiation of show cause proceedings against WebNet Communications, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, and Toll Provider Selection*, Docket number 001109-TI**.** On April 26, 2001, it issued an Order to Show Cause (Order #PSC-01-1027-SC-TI, http://www.floridapsc.com/dockets/documents/01/05203-01.html), and on December 31, 2001, it issued an Order Accepting Settlement Proposal (Order #PSC-01-2432-PAA-TI, http://www.psc.state.fl.us/Dockets/Documents/01/15540-01.html

of the case. As argued by the Prosecutorial Staff Attorney, WebNet "used this litigation to deflect attention from its own behavior and tried to focus on the Commission process for [investigating and prosecuting] slamming [cases] rather than looking at the facts of the case." Mr. Davidson testified:

> [W]e really couldn't see any mitigating factors on the part of WebNet that would justify us reducing [the penalty]. … there wasn't any behavior on their part that we could see that would cause us to reduce any of the aspects of the penalty.

We agree.

VI. REVOCATION OF WEBNET'S AUTHORITY TO PROVIDE SERVICE

The facts stated above, particularly those we relied upon to justify imposing maximum penalties on WebNet, establish that WebNet is unfit to provide intrastate telephone service in the State of Maine. The slamming statute specifically authorizes the Commission to revoke a carrier's authority to provide service in the state:

> [T]he commission, if consistent with the public interest, may suspend, restrict or revoke the registration or certificate of the local or intrastate interexchange carrier, so as to deny the local or intrastate interexchange carrier the right to provide service in this State.

35-A M.R.S.A. § 7106(2)(B).

In addition, if any person who has had a management or controlling role with WebNet is involved in a management or controlling role with another entity applying for a certificate of public convenience and necessity, we will consider denying that certificate or, if we grant it, that it be subject to the condition that the persons who were involved with WebNet not be allowed to participate in the new utility.[15]

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[15] The 1996 TelAct generally mandates open entry for any carrier desiring to provide intrastate telephone service:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a).

Subsection (b), however, states:

> (b) STATE REGULATORY AUTHORITY. – Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 253(b).

VII. ORDERING PARAGRAPHS

Accordingly, we

1. FIND that WebNet Communications, Inc. changed or caused to be changed the intrastate preferred carriers of 55 Maine customers, without the authorization of those customers and without using lawful verification procedures, in violation of 35-A M.R.S.A. § 7106(1)(A) and Public Utilities Commission Rules, Chapter 296, § 3(A) and (B);

2. ORDER WebNet Communications, Inc. to pay a fine of $ 4,555,000 as authorized by 35-A M.R.S.A. § 7106(2)(A) and PUC Rules Chapter 296, § 7(B), and as set forth in Appendix A. WebNet shall pay this penalty on or before July 15, 2003. It shall pay by certified check or money order payable to the Treasurer of the State of Maine, and send it to Dennis Keschl, Administrative Director, Maine Public Utilities Commission, State House Station 18, Augusta, ME 04333-0018;[16] and,

3. REVOKE the certificate of authority granted to WebNet Communications, Inc. to provide intrastate telephone service in Maine, issued on March 17, 2000, in Docket No. 2000-100, as authorized by 35-A M.R.S.A. § 7106(2)(B).

Dated at Augusta, Maine, this 16th day of June, 2003.

BY ORDER OF THE COMMISSION

_____

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

[16] If it comes to our attention that any assets belonging to or owed to WebNet are subject to the jurisdiction of this State, we will take action, if necessary, to obtain those assets in order to apply them to the penalty.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21** days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.